Nos. 14469 - 14470

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN K. BORG,
Appellant,
vs.
LOUIS A. BOAS and THE NEWS-REVIEW PUBLISHING COMPANY, INC., a Corporation,
Appellees,
and
JOHN K. BORG,
Appellant,
vs.
THE TRIBUNE PUBLISHING COMPANY, a Corporation,
Appellee.

Nos. 14469 14470

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO CENTRAL DIVISION

BRIEF OF APPELLANT

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JURISDICTION

These actions were commenced in the Federal District Court by reason of diversity of citizenship. U.S.C.A. title 28, Sec. 1332. They were consolidated for trial by order of the court (R. 28). Plaintiff is a resident of the State of Washington; defendant corporations and the individual defendants are residents of Idaho, and the amount sued for in each action is in the sum of $75.000.00, exclusive of interest and costs (R. 3-7).

These cases come within the appellate jurisdiction of this court upon appeal from final judgments in the actions at law or in equity. U.S.C.A. title 28, Sec. 1291. Final judgments and decrees were entered in the District Court on April 8, 1954. Notice of appeal therefrom was filed on May 7, 1954 (R. 17-19 and 19-21).

STATEMENT OF THE CASE

Appellant, John K. Borg, herein designated as plaintiff, brought the above actions for the recovery of damages resulting from the publication and circulation of libelous articles on May 13, 1953 by the respondents, T. C. Thomas, Louis A. Boas and the News Review Publishing Company, Inc., herein designated as defendants or referred to herein as Cause No. 1950, and T. C. Thomas and the Tribune Publishing Company, Inc., herein referred to as Cause No. 1951.

Plaintiff in brief alleges in Cause No. 1950—No. 14469

in this Court—among other things, that plaintiff is a resident of the State of Washington and that the defendants are residents of the State of Idaho and that the amount sued for, exclusive of interests and costs, is in the sum of $75,000.00 (R. 3-6). That the defendants published and circulated of and concerning the plaintiff on May 13, 1953 a certain article which was false and untrue, particularly in the following respects:

> "Thomas then made references to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case.
>
> " 'This was a ridiculous situation,' said Captain Thomas. A motion for dismissal was made and it was dismissed. 'If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.'
>
> * * * *
>
> "But these things, Thomas said, 'continue to disturb me';
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> * * * *
>
> " '3. The extraordinary circumstances in which the first felony was dismissed.
>
> " '4. Circumstances of the dismissal of the second charge against Estes.

* * * *

" 'There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,' Thomas concluded." (R. 5, 6; Ex. 1).

By reason of the circulation of the foregoing article, plaintiff was deprived of public confidence and suffered embarrassment and was held in contempt and obliquy in the estimation of his friends and acquaintances (R. 6).

Thereafter separate answers were filed by the defendants admitting that the controversy, exclusive of interest and costs, exceeds the amount of $3,000.00 (R. 7) and the publication and circulation of the article complained of by the plaintiff (R. 8); and as an affirmative defense allege that the complaint fails to allege a cause of action. That the article was a fair report of a public meeting held by citizens at the Moscow High School on May 12, 1953 for the purpose of discussing subjects and proceedings of public, official and judicial proceedings pending in the courts of Latah County; that the article was true in fact and the expressions and opinions are fair and impartial comments made in good faith without malice upon a matter of public interest (R. 12, 13).

In action No. 1951—No. 14470 in this Court—wherein T. C. Thomas, and the Tribune Publishing Company, Inc., are defendants, plaintiff's complaint is identical with Cause No. 1950, with the exception that the excerpts of the

article, which plaintiff complains are false and untrue read as follows:

"The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member.

"Captain Thomas declared that 'I don't like the smell of it. I don't think we have here in this county now the proper administration of justice.'

* * * *

"Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.

* * * *

"Legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge.

* * * *

"At 9 a. m., he added, the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

" 'This was a ridiculous situation,' Thomas said.

" 'Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over.'

* * * *

"But Thomas said these things disturbed him:

* * * *

" 'The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

" 'Circumstances of the dismissal of the second charge against Estes;

* * * *

" 'What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury.' " (R. 5, 6; Ex. 6).

The defendants interpose substantially the same defenses as in Action No. 1950. (R. 8-16).

These actions came on for trial to a jury (R. 25-28), and the undisputed testimony discloses that plaintiff, John K. Borg, was first appointed Justice of the Peace in Moscow, Idaho in 1944, and had been elected and re-elected and acting as such on May 13, 1953. Prior to 1953 the plaintiff had also occupied the position of Police Judge, but on or about November 15, 1952 he gave up this position (R. 52) and during his position as Police Judge he held court on traffic violations at the police station

(R. 82), but matters in the justice court concerning preliminary hearings were always held at the courthouse (R. 46, 61, 62, 76, 112, 123). Plaintiff was also employed at the Elks Club. (R. 45).

On January 15, 1953, the plaintiff having given up the office of Police Judge, had no office at the police station. The police court was entirely inadequate to hold preliminary hearings because it was a small room approximately 12 by 12, containing two desks and 6 or 7 chairs (R. 74, 120, 124, 200, 201).

Melvin Alsager, a practicing attorney, was sworn in as Prosecuting Attorney of Latah County on January 12, 1953 (R. 152). At the same time Lloyd G. Martinson was sworn in as Probate Judge. Within 15 minutes after Judge Martinson had taken office, Judge Martinson called Mr. Alsager and advised him that a criminal complaint had been filed (R. 64, 153) by Henry Felton (not a partner of Mr. Estes) of Lewiston, Idaho (R. 185, 186, 191, 194, 195).

At about 5 o'clock in the afternoon of January 13, Mr. Alsager appeared in Judge Martinson's office where the criminal cases were filed and discussed the filing of the complaint against Mr. Estes, a practicing attorney in Moscow, who was charged with accosting Richard Shoup with a deadly weapon, at which time Judge Martinson advised Mr. Alsager that he had disqualified himself (R.

160), but that the hearing had been set at 9 o'clock a. m., January 15, 1953 (R. 197), and that he had changed the venue of the matter to plaintiff's court (R. 160, 162).

Mr. Alsager discussed the filing of the complaint over the phone with Mr. Clements, opposing counsel in this action, Mr. O'Donnell, the former Prosecuting Attorney of Latah County, and Mr. Wynne Blake, Prosecuting Attorney at Lewiston, Idaho (R. 184, 203, 210, 211, 280).

In the afternoon of January 14, while plaintiff was working at the Elks Club, Judge Martinson gave him the file of *State vs. Estes* and advised him that he had disqualified himself to sit as judge and had transferred the venue of the action to Justice Court over which plaintiff was presiding for preliminary hearing and that the matter was set for hearing at 9 o'clock a. m., January 15, 1953 (R. 47, 52, 65).

Shortly after Judge Martinson had departed from the Elks Club, Mr. Alsager called upon plaintiff and discussed the Estes case with the plaintiff and advised him that he would not appear at the hearing the following morning (R. 52, 53, 79, 81, 88, 89). Mr. Alsager inquired of the plaintiff if he would require him as Prosecuting Attorney to attend the hearing, to which inquiry the plaintiff answered "No." (R. 163).

Section 31-2604 of the Idaho Code provides that a

Prosecutor does not need to appear unless called upon to do so by the Court (R. 198, 199).

On the 14th of January, 1953, Mr. Lawrence Huff, who is described as the Dean of the Moscow Bar, took an interest in the charge against Mr. Estes, who is also a practicing attorney, and discussed the charge filed against Mr. Estes with Mr. Alsager (R. 275, 276) at which time Mr. Alsager stated to Mr. Huff and advised him that he had not been consulted by the complaining witness nor anyone else prior to the time of the filing of the charge and that the criminal complaint drawn by Henry Felton of Lewiston, Idaho was faulty. After this discussion Mr. Alsager concluded that he would make a motion for the dismissal of the complaint and the motion for dismissal was prepared by Mr. Alsager and Mr. Huff and delivered to the court house to Judge Martinson's office for filing in the forenoon of the 14th of January, 1953, at which time Mr. Alsager advised that he would not appear at the hearing the following morning (R. 278, 279).

On the morning of January 15, 1953 Mr. Estes and his partner, Mr. Tom Felton, appeared at the courthouse, where there were a number of people congregated, including Mr. Fred Cassin, the Idahonian reporter. Neither the Prosecuting Attorney nor the complaining witness appeared at 9 o'clock to attend the preliminary hearing, and at about 9:15 a motion for dismissal was made on behalf

of Mr. Estes by Mr. Tom Felton, his associate (R. 236). Dismissal was denied until a check was made with the Sheriff's Office, which is next door to the courthouse, for witnesses who might appear against Mr. Estes; none were found; the motion for dismissal was renewed and granted at about 9:25 (R. 54, 93, 94, 106, 282-285).

In the meantime Mr. Alsager had changed his mind about attending the hearing and had congregated his witnesses and was waiting for trial at the police court (R. 167). Fred Cassin, reporter for the Daily Idahonian, was at the courthouse and remained there until the matter was disposed of (R. 223-226). The dismissal was granted on account of lack of evidence and the failure of the Prosecuting Attorney to attend (R. 226, 227).

Thereafter other charges were filed against Mr. Estes, and Mr. Louis A. Boas, one of the defendants and editor of the Idahonian, was familiar with the proceedings and particularly familiar with the fact that Mr. Estes had agreed to consent to a setting aside of the order of dismissal of January 15, 1953 and that the matter be heard as though no order of dismissal had been entered (R. 32, 33, 268).

On May 12, 1953 a public gathering was had at the high school, at which time one of the defendants, T. C. Thomas, was the chairman and chief speaker. The reporters for the defendants had reported said hearing,

which resulted in the publication and circulation of the articles upon which these actions are based. Mr. Boas was familiar with the Estes-Shoup situation, the paper having published previous articles concerning the order of dismissal on January 15, 1953 and again of another dismissal on April 19, 1953 (R. 31-35).

It appeared from the evidence that the Idahonian daily circulation was 4200 with approximately 12,000 readers (R. 30). An offer in evidence was made of articles published by the Idahonian commenting upon the plaintiff's conduct in dismissing the matter for the purpose of showing malice upon the part of the defendants. The introduction into evidence of said articles was objected to and the objection was sustained by the court (R. 32, 34-40). At this juncture counsel for plaintiff desired to argue the basis for the admission of said articles, and the following transpired:

> "MR. TONKOFF: Your Honor, it is offered in evidence for another purpose which I think I could make clear if Your Honor wanted me to make a statement in the presence of the jury, but I hesitate to do so.
>
> "THE COURT: I am not afraid of this jury, you can make your statement in their presence."

Counsel then advised the Court that reference by the Idahonian concerning plaintiff and the Estes matter had been made on 13 occasions and that the evidence is for

the purpose of showing malice and for a basis of punitive damages (R. 35, 36). Examining the articles (R. 36; Ex. 2, 3, 4, 5):

"THE COURT: The objection will be sustained. I can't see anything in these articles but news, there is nothing to show any malice. There is nothing here to show any malice on the part of this witness (R. 36).

"MR. TONKOFF: If the Court please, I base my contention on the ruling in the case - -

"THE COURT: The Court has ruled (R. 38).

The Lewston Morning Tribune has a daily circulation through central Idaho of 14,500 or about 40,000 readers. The article in Cause No. 1951 as well as Cause No. 1950 was authorized by the publishers (R. 41-43; Ex. 6). For the purpose of proving malice by reason of subsequent publications concerning the order of dismissal of January 15, 1953, Mr. William F. Johnston, Managing Editor of the Lewiston Morning Tribune, was interrogated:

"Q. Has the paper referred to the dismissal of the judgment by Judge Borg in the case of State vs. Estes between January 15, 1953 and May 13, 1953?

"MR. CLEMENTS: We object to that as being immaterial.

"THE COURT: The objection will be sustained." (R. 44).

Immediately after the appearance of the article of May 13, 1953, plaintiff noticed a change in his friends' attitude toward him. His friends and acquaintances shunned, walked away from and were frigid toward him (R. 72). He became nervous and lost considerable sleep and suffered headaches and finally in September, 1953, moved to Pullman, Washington (R. 73).

He received anonymous letters and phone calls, and particularly one from Kate Smith, who inquired of plaintiff over the phone as to why he had not reported the money he had received from Estes for disposing of the case. Other unidentified calls were received by plaintiff within the week (R. 55, 56), most of which concerned themselves with money received by plaintiff for the Estes dismissal; how much money he had received and if he had entered it in his income tax report. Objections were made to this type of testimony after it had been received, and the following transpired:

"MR. TONKOFF: Will you state what was said to you at the time of the calls?

"MR GREENE: Now we object to that as hearsay and not in the presence of any of the defendants and not binding upon them in any way. (in the presence of the jury)

"MR. TONKOFF: This, Your Honor, is the exception to the rule.

"THE COURT: I will let him answer, certainly these

defendants should not be responsible for any telephone calls they didn't have anything to do with (R. 35).

"THE COURT: We have a lot of calls all mixed up here, we don't know which he is talking about.

"THE COURT: Well, in the first place, the defendants could have no way in the world of meeting this evidence. In the second place there is nothing to show that these articles in the newspaper were the cause of it. This was a matter of public concern and they might have had information from attending the meeting themselves. There is nothing to show that any of these conversations that he had or any of the calls that he received or any of the letters were on account of the articles in the newspaper." (R. 54-57).

Concerning the receipt of the anonymous letters (R. 56):

"THE COURT: I thing it is highly prejudicial testimony to be allowed in, he is testifying about something that may not have had anything to do with the articles in the newspaper * * *

"THE COURT: * * * the letters being written or the calls being made to the witness would be just speculation and pure guess (R. 58).

"THE COURT: And the testimony in regard to the telephone conversations and the letters will be stricken and the jury instructed to disregard that." (R. 59).

Roy D. Guernsey, a tavern operator at Oniwah (R. 68) read the article in the Daily Idahonian, and the following question was propounded to the witness:

"Q. What impression did you derive from it concerning Judge Borg?

"MR. GREENE: I will have to object to that as being purely a conclusion on the part of the witness.

"THE COURT. The objection will be sustained." (R. 69).

Mr. Guernsey was asked concerning a conversation with Sergeant Clink, who on Sunday after the article appeared had a conversation with Mr. Guernsey at his place of business (R. 69).

"Q. Will you state what was said concerning the article and concerning the plaintiff?

"MR. GREENE: We object to that as hearsay and as a self-serving declaration and no proper foundation is laid and it does not tend to prove any issue in this case.

"THE COURT: The objection is sustained.

"MR. TONKOFF: I would like to make an offer of proof."

And in the absence of the jury the following offer of proof was made:

"The plaintiff offers to prove through this witness that after reading the article he was impressed with the fact that Judge Borg was corrupt and dishonorable and that he derived that opinion solely from reading the article which is the subject matter of this litigation, which article appeared in the Daily Idahonian May 13, 1953. Plaintiff offers to prove further through this witness that a discussion was had with

Sergeant Clink attending the University, who was in his place of business the following Sunday, at which time he inquired of this witness if he had read the article and that Sergeant Clink made the statement to this witness that after examining and reading the article there was no doubt but that the judge was dishonest and corrupt.

"I base the admissibility of this evidence on 12 A.L.R. Second,—I have indicated on the page,—(R. 69, 70).

"THE COURT: The offer of proof will be rejected.

"MR. TONKOFF: I have two or three other witnesses who would testify along the same line, and in the absence of the jury I would like to make an offer of proof as to their testimony.

"THE COURT: It will be understood that the offer has been made and the same rule by the court.

"MR. TONKOFF: Those witnesses, for the record, are Roland Noland, Tom Campbell and Mr. Nerk." (R. 70, 71).

Yet contrary to this ruling, the trial court admitted the testimony of Judge A. L. Morgan, without provocation prefacing his ruling with the following remark:

"THE COURT: I don't see why this would mean anything one way or another. I will let you read it, you may go ahead with the questions I have examined from Pages 8 to 10 inclusive. You may go ahead with all of the testimony there in the depositions." (R. 132).

In brief, the testimony was as follows:

"Q. You referred to one of the nurses remarking that

there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other persons? (R. 26).

"A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article." (R. 134).

The plaintiff attempted to introduce expert testimony as to the procedure and the manner in which preliminary hearings are disposed of when the complaining witness and the Prosecutor do not appear, contending that expert testimony is for the purpose of informing the jury of a technical matter.

"MR. TONKOFF: (Q) Now, Judge Borg, when a witness does not appear, and I am talking about the complaining witness now, and a motion is made for dismissal, with nobody present to represent the defendant, will you tell what is the proper procedure?

"MR. GREENE: We object to that as calling for a conclusion of the witness and invading the province of the jury (R. 58).

"MR. TONKOFF: I assume, Your Honor, that Judge Borg is an expert on this and I refer Your Honor respectfully to Vol. 243 of the Pacific. Just a moment, I have the citation here which in my opinion allows such testimony to be introduced and - - - -

"THE COURT: I think, Mr. Tonkoff, that it would be

error under the circumstances here to admit such testimony and I will sustain the objection." (R. 74, 75).

Along the same line, for the same purpose, Mr. Lawrence Huff, the senior member of the Moscow Bar, was asked:

"Q. You are familiar with preliminary hearings, are you not, as a practicing attorney?

"A. Yes, sir.

"Q. Would you state what the procedure is when a complaining witness does not appear at a preliminary hearing?

"MR. GREENE: We object to that as calling for a conclusion of the witness on a matter of law and invading the province of the jury.

"THE COURT: The objection will be sustained.

"Q. Mr. Huff, does a Prosecutor appear at all preliminary hearings?

"MR. GREENE: We object to that, if the court please, as being immaterial and not tending to prove or disprove any issue in this case.

"THE COURT: He didn't appear at this one (R. 114).

"MR. TONKOFF: I am trying to find out what the procedure is and I think as an expert he should be allowed to answer the question. I don't know what Your Honor's rule is on the matter, that is the purpose of this question, to find out what the practice is, I think it is quite important.

"THE COURT: I can tell you what the practice is, the Prosecuting Attorney has to be at a prelim-

inary hearing if one is held, or have an assistant there. We don't need to testify to that.

"MR. TONKOFF: I would like to cite you the statute on that.

"THE COURT: I will let him answer. I know what it is.

"Q. Is there a statute in that respect concerning the appearance of the Prosecuting Attorney at preliminary hearings?

"A. I find myself in a very embarrassing position and I am very reluctant to answer in view of the statement of His Honor." (R. 115).

On cross examination Mr. Alsager was asked if he had phoned Prosecuting Attorney Wynne Blake in Lewiston, Idaho on the evening of the 14th to consult with him concerning the pending action of January 15, 1953.

"Q. Now isn't it a fact that you made a call to Winn Blake, the Prosecuting Attorney, at Lewiston, Idaho, Nez Perce County, on the 14th day of January, 1953?

"A. I may have made a call, I don't recall it necessarily but then it may have been, although it doesn't stand out in my mind at this time I may have.

"Q. And you called him for the specific purpose of getting information on the Estes case?

"A. I may have called him, yes, I don't recall it exactly now.

"Q. Your testimony is that you may have called him?

"A. Yes, I don't deny that I called him.

"Q. For what purpose did you call him except about the Estes case, that is on January 14?

"A. If I did call him, it may have been in connection with this case. Blake and myself call back and forth in the last year and a half. We consult one another on different matters here but it may have been in connection with this case alright.

"Q. Did you consult with him with relation to this case?

"A. I may have, yes.

"Q. Do you remember the advice he gave you?

"A. Well of course I don't even remember any conversation with him.

"Q. Do you have any distinct recollection of your conversation with Mr. Clements?

"A. Only to the extent that I told you about, yes, that is all.

"Q. Isn't it a fact that Mr. Blake told you that Henry Felton had prepared the complaint and for you to ignore it?

"A. I don't recall that, no.

"Q. Do you recall any of the conversation?

"A. No, I do not, not even my own conversation.

"THE COURT: Well, counsel is making quite an effort here to see if he can mix this witness up, I will let him go. I don't know whether counsel has ever been on the witness stand or not, but I have and I know it is a pretty hard thing to contend with a lawyer sometimes when you are on the stand." (R. 210, 211).

In order to meet this testimony, Wynne Blake was called, who identified himself as Prosecutor of Nez Perce County, residing at Lewiston, Idaho (R. 280).

"Q. Do you recall a telephone call from Mr. Alsager at Moscow?

"A. Yes, sir.

"Q. * * * and about what time?

"A. Early in the evening, around 6:30 or 7:00.

"Q. And will you state what conversation you had with him?

"MR. CLEMENTS: We object to that as incompetent, irrelevant and immaterial.

"THE COURT: The objection is sustained.

"THE COURT: You can state if you want to impeach Mr. Alsager, you can state to this witness Mr. Alsager's testimony and ask him if it was true. That testimony has no bearing in the case except for one thing and that is to impeach the integrity of Mr. Alsager.

"MR. TONKOFF: I thought I asked Mr. Alsager.

"THE COURT: You asked Mr. Alsager but you didn't

ask him the question that you had asked Mr. Alsager nor did you give Mr. Alsager's answer. I remember Mr. Alsager's testimony, I was listening to it very carefully.

"THE COURT: I can tell you what he said, he said that he couldn't remember just what he discussed with him on the telephone.

"MR. TONKOFF: Then I take the position that I could ask this witness the question. I had no other opportunity, a witness can always avoid impeaching questions by saying, 'I don't remember.'

"THE COURT: Then this time he avoids it." (R. 280, 281).

While Mr. Tom Felton, associate of Mr. Estes, was on the stand (R. 282) he was asked concerning the time he made the motion for dismissal:

"Q. What time did you make that motion?

"A. It was shortly after 9 o'clock, the exact time I don't recall the first time I made the motion.

"THE COURT: Didn't you go into this in your case in chief? It seems to me that I remember the dismissal.

"MR. TONKOFF: It has been testified to by Mr. Alsager that it was shortly after 9, though I want to develop some definite time.

"THE COURT: Oh, you are still after Mr. Alsager, go ahead." (R. 284).

After E. D. Hill had testified on behalf of the de-

fendant, plaintiff's counsel had no reason to cross-examine, and the following took place:

"MR. TONKOFF: No questions.

"THE COURT: Mr. Hill, I might tell you that you got off easy." (R. 222).

At the conclusion of the plaintiff's testimony, motion for directed verdict was made and denied (R. 147-151). At the conclusion of all the testimony a motion was made for directed verdict, which was granted (R. 285, 286), and the Court granted the same in the following language (R. 287-292):

"The evidence in this case has taken a very wide range during the past three and a half days, but it has been narrowed down to the question of whether the published articles of May 13, 1953, appearing in the Lewiston Morning Tribune and the Daily Idahonian were libelous and published with malice, or in other words, were the articles themselves of a malicious nature, or were they intended to injure and damage the plaintiff by attacking his honesty, or even inferring that he was dishonest or unfit for the position he held.

"In a determination of this question the articles as published must be taken as a whole, and then we must consider the intent of the publisher of the article. To do this we must go into the background or the reason for the meeting that was held, and which was reported and the report published the next day in the respective papers. We have evidence here of the incidents leading up to the meeting of the citizens, incidents beginning back in December of 1952, resulting in complaints being filed charging Mr. Estes

with a felony, to-wit, Assault with a deadly weapon; thereafter the matter was brought before a committing magistrate, certain actions were taken by the committing magistrate, apparently to the dislike of some citizens resulting in a great deal of discussion and newspaper articles in the Spokesman-Review, and finally a meeting held on May 12, 1953. Here the newspapers in question came into the picture, their reporters attended the meeting, reported the proceedings, and we must remember that the articles were a report of a meeting conducted by laymen, how else would laymen express their feelings, one utterance was 'Had this been an honest mistake' etc., this and other statements were honestly and fairly reported in these articles. Indeed it appears to me that there must be considerable imagination injected into any consideration of this, to reach the conclusion that the articles were libelous—much less published with malice.

"We must be careful in such matters less we stifle the press and free speech; lest we find ourselves as many other people find themselves today, fearful of speaking—and having a press subservient to any certain group.

"The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and

the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.

"It is unnecessary for me to comment on it, but I will say it was the duty of the Justice Court, if he did not want to conduct the examination, to tell the Prosecuting Attorney that he wanted him to conduct it. If he did not tell him that he wanted him to conduct it, the Prosecuting Attorney did not appear. If he did not call the Prosecuting Attorney then he should have called the witnesses and determined whether there was probable cause to hold the defendant for trial on the charge or dismiss it. Instead of trying to locate witnesses and call the county attorney to advise them that the hearing was being held, he summarily dismissed the case and by so doing he no doubt left himself open to criticism. Sometimes when criticism is made by laymen there may be some harsh statements made, but even laymen have a right to draw a reasonable inference from the facts.

"Sometimes things happen that give the appearance of evil, and in the conduct of human affairs it is well to keep in mind that provision of the Scripture that says, 'You should avoid the appearance of evil' and to my way of thinking that is particularly true of public officials, and it is well to remember that it would be a serious matter to lay down a rule of law that would make a citizen or newspaper fearful of criticizing officials for permitting conditions of law enforcement to exist in a community that were unhealthy to its community life.

"Our public officials should so conduct themselves

as not to bring on such criticism. Everyone has a right to comment on matters of public interest and concern and criticize freely the acts of public officials with an honest purpose, however severe in terms, as long as the facts stated form a reasonable basis for the conclusion reached. I can find no evdience in the record that the articles in question were not fair comments on the conditions that existed at the time the articles were published. If I submitted this case to you, I would have to advise you that you must find malice on the part of the Publisher. Malice as used in law of libel means just about what it means to us in everyday speech. It means a wicked and pervert desire to inflict harm on a person for the sake of inflicting harm. Malice is ill will. There is nothing to show in this report of the public meeting and the evidence now before us. The facts are just to the contrary. The Moscow paper published the statement of Mr. Estes word for word as he requested it, showing they were willing to publish all the facts, even from Mr. Estes.

"I am sorry in this case that it was necessary, or anyone felt it was necessary, to charge corruption, perjury, or attack the integrity and honesty of the members of this bar. I have been on this Bench for a long period of time, and I have felt that the Bar of Idaho was as fine a Bar as there could be anywhere. This case was presented by very able counsel. Mr. Tonkoff and myself have disagreed sometimes during the trial of this case as to the law. He may have been right and I may have been wrong, but he is one of the ablest counsel that the State of Washington has, and he comes to us from the State of Washington, and he comes to us with a reputation of honesty and integrity above reproach.

"In our system of jurisprudence the Court has certain duties as well as the jury, one of those duties is to relieve the jury of the responsibility of passing upon

questions where the evidence, in the Court's judgment, is insufficient to submit the matter to the jury. It would be rather foolish and ridiculous for me to submit this case to you, and then say as a matter of law I would have to set your verdict aside unless it agreed with my opinion.

"I am assuming that responsibility here, and in the foregoing statement I have endeavored to point out deficiencies in the evidence here to make out a case to submit to you as jurors. You will understand that you are assuming no responsibilty here; it is entirely the responsibility of the court. I am granting the Motion for an instructed Verdict."

SPECIFICATION OF ERRORS

The district court erred as follows:

1. The court erred in rejected Exhibits No. 2, 3, 4, and 5 offered in evidence by the plaintiff, the same being other newspaper articles on the same subject published by the defendants (R. 35-40, 44).

2. The court erred in sustaining defendant's objections to plaintiff's offer of evidence to establish the circulation of the articles complained of, and the impression and understanding created by such articles upon the readers thereof (R. 57-59, 69-75).

3. The court erred in excluding plaintiff's evidence to show the procedure in a preliminary hearing when the prosecuting attorney and complaining witness fail to appear (R. 74, 75, 114, 115).

4. The court erred in excluding rebuttal testimony

of Wynne Blake, Prosecuting Attorney of Nez Perce County (R. 280-282).

5. The court erred in its unprovoked remarks throughout the trial not pertaining to the evidence or the issues in the case which were highly prejudicial to the plaintiff.

6. The court erred in permitting into evidence Exhibit No. 23 over plaintiff's objections (R. 272-273).

7. The court erred in each action in granting defendants' motion for directed verdict, and in directing the entry of judgment in favor of the defendants in accordance with such verdict (R. 285-292).

8. The court erred in entering judgment of dismissal in each action in favor of the defendant (R. 17, 19).

9. The court erred in failing and refusing to submit each action to the jury for its verdict.

ARGUMENT

I.

THE COURT ERRED IN RULING THAT THE ARTICLES PUBLISHED BY THE DEFENDANTS ARE NOT LIBELOUS AND THEREBY DIRECTING A VERDICT IN DEFENDANTS' FAVOR.

It is conceded that the publication of the articles which are the basis of these actions was authorized by the defendant corporations' agents (R. 40, 43).

Definitions of libel vary in phraseology, and attempt-

ed definitions are practically innumerable. None have been so comprehensive and accurate as to encompass all cases that might arise.

Some courts, including Idaho, have adopted and patterned civil liability for libel upon the penal statute. *Sweeney v. Capital Pub. Co.*, 37 Fed. Sup. 355. The decisions cited in the foregoing case hold that it is a libel to charge one with any crime, corruption, fraud, dishonesty or any moral or vicious practice or unworthiness to hold office or to malign anyone in his profession.

The same ruling is found in *Jenness v. Co-op Pub. Co.*, 36 Ida. 697, 213 Pac. 351. In this case libel is defined in the penal statute, Sec. 18-4801, I.C., as:

> " * * * malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or punish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule." *Gough v. Tribune Journal Co.*, 249 P. (2d) 192, 73 Ida. 173.

This case has adopted the following language defining libel:

> "In 53 C.J.S., Libel and Slander, Par. 13, p. 59, the author states the rule as follows:
>
> " 'In order to be libelous per se, the defamatory words must be of such a nature that the court can presume as matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred,

contempt, or ridicule or cause him to be shunned and avoided; in other words, they must reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt or disgrace. The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize.'"

In the case of *Dwyer v. Libert*, 30 Ida., 576, 167 Pac. 651, it is said:

"To charge a man in a written publication with willful falsehood in the matter of a serious business transaction must necessarily expose him to contempt and have a tendency to lower him in the common estimation of citizens."

"A libelous writing must be considered in its natural and obvious sense and in the sense in which the words used would ordinarily and reasonably be understood by the readers of the publication, without regard to the conclusions of the pleaders. It must be considered as a whole and not in part or parts detached from the main body of the publication." *Gaffney v. Scott Pub. Co.*, 35 Wn. (2d) 272, 212 P. (2d) 817; *Roane v. Columbian Pub. Co.*, 126 Wash. 416, 218 Pac. 213; *Blende v. Hearst Publications*, 200 Wash. 426, 93 P. (2d) 733, 124 A.L.R. 549.

And the fact that true statements are interspersed throughout the article makes it nonetheless damaging in its effect nor do any such statements relieve the defendant from liability. *Miles v. Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847; *Ward v. Painters Local No. 300*, 41 Wn. (2d) 859, 252 P. (2d) 353; 33 Am. Jur. 161 (Libel and Slander) Sec. 169, 3 Restatement of Torts 169, 174, Sec. 569 and

607; *Hubbard v. Allyn,* 86 N. E. 356; *Snyder v. N. Y. Press Co.,* 121 N. Y. Sup. 944.

The defendant in *Gaffney v. Scott Pub. Co., supra,* charged the plaintiff as Prosecutor of Franklin County of shielding the criminal element at Pasco, Washington by failing to make a proper effort to bring the criminals to justice and that his attitude toward the criminal element was of such a friendly character that he would not co-operate with other law enforcing officials. The court stated:

> "The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials; but, in the exercise of such privilege, a publication which imputes to them misconduct in office, want of official integrity or infidelity to public trust, if possible, is a violation of that privilege and gives rise to an action for damages."

In the case of *Lynch v. Republic Publishing Co.,* 40 Wn. (2d) 379, 243 P. (2d) 636, plaintiff was running for re-election for Justice of the Peace. The defendant in substance published an editorial that stated that plaintiff was not qualified to act as judge and did not assure fair and just trials for defendants appearing in his court. The court held that attacking the plaintiff in such manner was libelous per se.

In *Otero v. Ewing,* 110 So. 648, 56 A.L.R. 249, the plaintiff was running for election to judgeship. The article written by the defendant reflected upon the character and

reputation of the plaintiff as a man and as a lawyer and was calculated to injure him and to expose him to public hatred, contempt and ridicule and was therefore libelous per se.

In *Cook v. East Shore Newspapers, Inc.*, 327 Ill App. 559, 64 N. E. (2d) 751, the defendant charged the plaintiff while holding the position of judgeship with misconduct in office. The court held that that was libel per se in the absence of proving the truth of the charges.

In *Washington Times Co. v. Bonner*, 66 App. D. C. 280, 86 F. (2d) 836, 110 A.L.R. 393, the defendant charged the plaintiff with violations of his duties while he was employed by the United States Federal Power Commission. Such charges were considered libelous per se.

See also *Ziebell v. Lumbermen's Printing Co.*, 14 Wn. (2d) 261, 127 P. (2d) 677.

In view of the foregoing rules, considering the article in Cause No. 1950, the obvious and natural sense of the words and the implications attached thereto would ordinarily and reasonably be understood by an ordinary reader:

(1) That the plaintiff was a party to legal maneuvers preventing the administration of justice.

(2) That plaintiff ridiculously and without reason

or grounds granted a motion for dismissal in order to defeat justice.

Clearly, this language charges the plaintiff with misconduct in office, want of official integrity, and infidelity to a public trust, and brings him in public contempt and calumny.

The language in Cause No. 1951 obviously charges the plaintiff that while he was acting as a judge:

(1) That plaintiff refused to properly administer justice.

(2) That plaintiff took part in legal maneuvers making it impossible for the prosecuting attorney to fairly try his case.

(3) That plaintiff entered into a conspiracy with the defendant in a criminal charge to defeat the administration of justice.

(4) That the plaintiff was situated in a ridiculous situation in connection with the administration of justice.

(5) That the plaintiff acted dishonestly in dismissing a criminal charge.

(6) That plaintiff willfully failed to administer justice.

In spite of this language, at the conclusion of the evidence the trial court directed a verdict in favor of the

defendants, which the plaintiff respectfully submits is contrary to the facts and the law.

II.

QUALIFIED PRIVILEGE AND FAIR COMMENT ARE NOT AVAILABLE AS DEFENSE WHEN ARTICLES ARE LIBELOUS PER SE AND FALSE.

For the foregoing reasons and based on the authorities above cited, these two newspaper articles were each libelous *per se;* and the District Court committed reversible error in refusing to so hold as a matter of law.

Appellees failed to sustain their burden of proof in establishing their affirmative defenses that the articles were true. No substantial evidence was introduced to prove the truth of these articles.

In any event the question as to the truth or falsity of these newspaper articles was clearly a question of fact which should have been submitted to the jury.

The rule of law is well settled in the Federal Courts and by the weight of authority in the State courts that qualified privilege and fair comment as to public officers or others are not available as defenses, when, as in these cases, the newspaper articles are libelous *per se* and false. The decision of the District Court dismissing these actions as a matter of law without submitting the same to the jury is directly in violation of this well settled legal

principle, and is, we submit, unprecedented in the Federal Courts.

This well settled legal principle is stated as follows in the excellent annotation on this question in 110 A.L.R. 412, citing numerous Federal and State court decisions:

> "In the majority of jurisdictions the rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, does not apply to a false statement of fact. In these jurisdictions, *a defamatory statement of fact concerning one in public office, if false, is as actionable as would be such a statement concerning one in private life.*" (All italics are ours).

In *Washington Times Co. v. Bonner,* (C.A.D.C.) 86 F. (2d) 836, 110 A.L.R. 393, the court affirmed judgment for $45,000.00 against the newspaper for libel, quoted numerous authorities to the same effect, and stated:

> "But *the great weight of authority* in the state courts, and *the rule in the Federal courts,* is to the contrary—that *the right of fair comment does not extend to misstatements of fact.* More than a score of the state courts take this view."

The decision of this Court on this question in *Nevada State Journal Publishing Co. vs. Henderson,* (CCA 9) 294 Fed. 60, certiorari denied, 264 U. S. 591, 44 S. Ct. 404, 68 L. Ed. 865, left no doubt on the subject. This Court there so held, and affirmed judgment for damages against the newspaper for libel. Judge Rudkin, speaking for this Court, Judges Gilbert and Hunt concurring, said:

"We will now return to the question of privilege. Upon that question the court instructed the jury as follows:

" 'The mere fact that a man is a public officer, or is a candidate for public office, does not constitute a warrant either to the ordinary citizen or to a newspaper, to spread false charges against him of criminal acts or disgraceful conduct. In a sense, in becoming a candidate, a man invites close scrutiny and opens his life to the light of publicity. Within the range of good faith a newspaper may properly disclose to the public and advise the electorate of the state of his every act and utterance, and criticize and comment thereon, even with severity, and suggest any reasonable inference or implication therefrom bearing upon the fitness or qualification faithfully or efficiently to discharge his duties as a public officer, or his qualifications for the office which he seeks. But the distinction must be drawn between comment and criticism, and untrue charges of facts constituting a crime or disgraceful conduct. It is one thing to pass severe criticism upon, or to draw even extreme inferences from, acknowledged facts, or to indulge in intemperate denunciation, even though bitter, and quite another thing to assert the existence of particular acts of criminality or of shameful misconduct upon the candidate's part. *Neither the newspaper nor the citizen may with impunity falsely charge the candidate or the public officer with specific acts of criminality or shameful conduct.*'

"*This instruction is in harmony with the great weight of authority.* (Citing numerous cases) . . .

"There is no error in the record, and the judgment of the court below is affirmed."

In the leading case of *Post Publishing Co. v. Hallam,* (CCA 6) 59 Fed. 530, cited with approval in the Hender-

son case and quoted with approval in the Bonner case, (later) Chief Justice Taft speaking for the court, said:

> "But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit himself uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. . . . But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold."

In *Post Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921, cited with approval by this court in the Henderson case, the court affirmed judgment for plaintiff and said:

> "The real ground on which the alleged privilege is claimed in argument is that, inasmuch as the investigation of the conduct of the police commissioners was a matter of public concern in the City of Cincinnati, and the character of their appointees on the police force was incidentally involved, the defendant, so long as it was not actuated by malice, had the right to publish as an item of news, and in the public interest, any criticism, comment, or statement con-

cerning the personal character and standing of the plaintiff, as well as his official action and conduct as a policeman. . . . We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputations; and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it. That rule has not been generally adopted in this country, (citing cases) and the converse of it has hitherto obtained in this state."

In *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110, 51 L.R.A. 451, approved in the Henderson case, the court reversed judgment of dismissal in a libel action and said, citing numerous authorities:

"We are of the opinion that the court erred in saying that the words were privileged. Not being privileged, it should have been left to the jury to say whether the evidence showed that plaintiff's support of these measures was opposed to the moral interests of the community as a matter of fact; in other words, to determine the truth of the charge.

"It is hardly necessary to cite authorities in support of the doctrine that a candidate for office has a right of action for aspersions upon his character, and cannot to be subjected to unwarranted and untruthful charges."

In the leading case of *Burt v. Advertiser Newspaper*

Co., 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97, in affirming judgment against the newspaper, Justice Holmes, speaking for the court, said:

> "Moreover the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

In the recent case of *Caldwell vs. Crowell-Collier Publishing Co.*, (CCA 5) 161 F. (2d) 333, 336, Judge Sibley, speaking for the court, said:

> "More broadly it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even vituperated, *but the facts cannot be perverted with impunity.*"

See also to the same effect:

Carey v. Hearst Publications, Inc., 19 Wn. (2d) 655, 143 P. (2d) 857;

Graham v. Star Publishing Co., 133 Wash. 387, 233 Pac. 625.

The district court therefore clearly erred in flagrantly

disregarding these well settled legal principles, in refusing to submit the cases to the jury, and in granting the motion for a directed verdict.

III.

THE COURT ERRED IN HIS RULING THAT THE DEFENDANTS ARE NOT SUBJECT TO LIABILITY IN ANY EVENT IF THE ARTICLES WERE LIBELOUS FOR THE REASON THAT THE PUBLICATIONS WERE AN ACCURATE REPORT OF A PUBLIC GATHERING OF LAYMEN.

The Court throughout the record and in his memorandum granting the defendants' motion for directed verdict held and concluded that the defendant corporations publicized and circulated the libelous articles as an honest and fair report of the proceedings of a public gathering of laymen and that there could not be any liability on the part of the defendants if the articles were libelous because the defendants had a privilege to print such matter (R. 288). The trial Court is not sustained by any legal authority, as demonstrated by the following cases.

A person who repeats or otherwise publishes defamatory matter is liable to the same extent as though he had originally published it, and a newspaper editor cannot escape liability for a defamatory publication by naming the author and stating where the libel was first published.

In the case of *Times Pub. Co. v. Carlisle*, 94 Fed. 762,

the Eighth Circuit Court of Appeals through Judge Sanborn said:

> " 'A good name is rather to be chosen than great riches, and loving favor rather than silver and gold.' The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his later years. * * * it is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant. It is no defense to an action of trespass that another trespassed, and informed the defendant how to do it without expense or trouble; and it is no excuse or justification for an injury to a fair reputation that another has commenced to besmirch it, and has furnished the pigments to carry on the nefarious undertaking."

The same holding is reiterated in *Lubore v. Pittsburg Courier Publishing Company,* 101 Fed. Supp. 234 (D. C. 1951). See also 3 Restatement of Torts, Sec. 578; Prosser on Torts, page 812.

A reprint by a publisher of a newspaper dispatch is no defense. *Carey vs. Hearst Publications, Inc.,* 19 Wn. (2d) 655, 143 P. (2d) 857; which case has adopted the following language:

> "The prevailing rule in this country was epitomized by Mr. Justice Holmes in *Peck v. Tribune Co.,* 214 U. S. 185, 189, 53 L. Ed. 960, 29 S. Ct. 554, 16 Ann. Cas. 1075: 'If the publication was libelous the defendant took the risk. As was said of such matters by Lord

Mansfield, ' "Whatever a man publishes, he publishes at his peril." ' "

See also *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847.

The repetition of slanderous words gives rise to a separate and independent cause of action. *McKay v. Foster,* 166 N. Y. S. 331, 179 App. Div. 303.

IV.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO EVIDENCE OFFERED BY THE PLAINTIFF OF PRIOR AND SUBSEQUENT PUBLICATIONS WHICH WOULD PROVE:

(1) Knowledge of falsity on the part of the defendants of the article of May 13, 1953.

(2) Malice on the part of the defendants, which would deprive the defendants of the defense of qualified or conditional privilege if it were available to them.

(3) Punitive damages. (Ex. 2, 3, 4, 5 refused; R. 35-40, 44).

The evidence discloses that Fred Cassin, reporter for the Idahonian, knew that the Estes hearing would be had at the courthouse and attended it and reported the procedure.

Mr. Boas, the editor, was apprised of the fact that Mr. Estes had volunteered to have the court set aside the

order of dismissal and proceed with the hearing (R. 32, 33, 268).

Editors of both papers were fully cognizant of the matters and things happening at Moscow and had on several occasions published and referred to the January 15 proceeding. Through their investigation they necessarily must have arrived at some conclusions as to the truth or falsity of the matter. If they had reason to believe that the articles were untrue or false or that they were negligent in ascertaining the truth, then the defense of qualified privilege is not available to the defendants. *Gott v. Pulsifer,* 122 Mass. 225; *Toothaker v. Conant,* 91 Me. 438; *McKillip v. Grays Harbor Pub. Co.,* 100 Wash. 657, 171 Pac. 1026.

The municipality of publications, in addition to proving malice, has a bearing upon damages. *Mannix v. Portland Telegram,* 23 P. (2d) 138, 90 A.L.R. 55; 58 C.J.S. 522, Sec. 214.

The existence of malice may be inferred from the article itself. Actual malice may be inferred from falsity, absence of proper cause, or other relative circumstances, or from communications, of which it forms a part. All circumstances surrounding a transaction are proper for consideration, including a failure to make a proper investigation. *Cook v. East Shore Newspapers, supra.* See also 33 Am. Jur. 113, 114, Sec. 111.

Malice is a matter for the jury to determine from all the facts and circumstances and not a matter for the court to determine, unless the minds of reasonable men cannot differ on the subject, which plaintiff contends is not the situation in the case at bar.

V.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO PLAINTIFF'S OFFER OF EVIDENCE SHOWING THE IMPACT OF THE ARTICLE ON THE PLAINTIFF AND ALL PERSONS WHO READ THE ARTICLE.

From the testimony given and stricken by the court and the offer of proof, it appears that the plaintiff sustained mental and physical injury and that the article created an impression upon the readers that plaintiff was corrupt and dishonest in performing his duties as judge (R. 57-59, 69-75).

The interpretation of a defamatory matter is not upon the defendant's understanding of the meaning of the words or his intention as to whom they apply if the recipient reasonably under the circumstances gave the words a different meaning or understanding. (Belli, *Modern Trials*, pg. 502, Sec. 11).

The fact that the readers were impressed and were imbued with the idea that the plaintiff received money for the dismissal of the charge against Mr. Estes clearly proves the viciousness of the articles.

The trial court withheld all such evidence tending to show the damage to the plaintiff and which testimony without any ambiguity is admissible under the decisions. *Maddox v. News Syndicate Co., Inc.*, 176 Fed. Sup. 897, 12 A.L.R. (2d) 988. The annotation following this case and the majority rule discloses that California, Massachusetts and Michigan hold that such testimony is admissible. In addition to the foregoing authority, Washington in *Luna v. Seattle Times Co.*, 186 Wash. 618, 59 P. (2d) 753, 105 A.L.R. 932, followed by an annotation at pg. 944, adds authority to the admissibility of evidence proving the effect of the article upon its readers.

The majority of cases hold that when an article is published concerning a public official which is libelous per se, the defendant must prove the truth; otherwise, there is no defense of qualified privilege. *Cook v. East Shore Newspapers*, supra; *Wash. Times Co. v. Bonner*, supra; *Hollenbeck v. P. I. Co.*, 162 Wash. 14, 207 P. 793; *Miles v. Wasmer*, supra.

VI.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO PLAINTIFF'S EVIDENCE TO SHOW THE PROCEDURE IN A PRELIMINARY HEARING WHEN THE PROSECUTING ATTORNEY AND COMPLAINING WITNESS FAIL TO APPEAR.

The matter of technical procedure can be proven by expert testimony. *Lynch v. Republic Publishing Co.*,

supra. The testimony rejected by the court was offered by the plaintiff, who had acted as judge for the justice court since 1944 and who certainly would be qualified to testify as to what the normal procedure was. In additon, Mr. Lawrence Huff, the oldest member and considered the dean of the Moscow Bar, offered to testify as to the procedure, all of which was rejected by the trial court (R. 74, 75, 114, 115).

It is certainly important for the jury to understand that under the circumstances such as occurred on January 15, 1953 when the Prosecuting Attorney and the complaining witness failed to appear, that it was a proper and customary procedure and nothing underhanded and corrupt or dishonest for the court to enter an order of dismissal for the lack of proof.

Under the state of the record, and without expert testimony, the jury in all probability would have been impressed with the proposition that the judge acted unfairly and with bias and prejudice against the prosecution and in favor of the defendants.

VII.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE EVIDENCE OFFERED BY WINN BLAKE, PROSECUTING ATTORNEY OF NEZ PERCE COUNTY.

The defense in this case was attempting by direct evidence or by innuendo to show and to prove that the

plaintiff entered an order of dismissal on January 15, 1953 by misleading the Prosecuting Attorney and holding the hearing at the county courthouse. The evidence disclosed that the Prosecuting Attorney had full knowledge that the hearing was to be held at the courthouse on the 13th of January, 1953; that he had discussed the matter with Mr. Clements, opposing counsel, and Mr. O'Donnell, and Mr. Wynne Blake on January 14, 1953, and in addition to this, together with Mr. Huff, prepared an order of dismissal which he had filed with the probate judge.

Mr. Alsager's testimony was to the effect that he had a recollection that he had talked to Mr. Wynne Blake over the telephone on the 14th of January, 1953, but had no recollection of what he or Mr. Blake had said. Under these circumstances, it is not a matter of impeaching Mr. Alsager, but it is a matter of showing affirmatively that he had made the statement to Mr. Blake that he would dismiss the charge, and consequently accounting for his absence from the hearing. In addition to this, he had also told the plaintiff that he would not appear at the hearing. Under these circumstances, it was obvious error to deny the admission of Mr. Blake's testimony (R. 280-282).

VIII.

THE COURT'S UNPROVOKED REMARKS NOT PERTAINING TO THE EVIDENCE OR THE ISSUES IN THE CASE ARE HIGHLY PREJUDICIAL AND THE TRIAL COURT SHOULD BE INSTRUCTED TO REFRAIN FROM SUCH CONDUCT OR PREFERABLY INVITE ANOTHER TRIAL JUDGE IN THE EVENT THIS MATTER IS SENT BACK FOR RETRIAL.

Plaintiff concedes that the trial court may comment upon the evidence and issues to the jury, but the plaintiff contends that the remarks of the trial court should be confined only to the evidence and issues.

The record is replete with the trial court's remarks on matters and things not in connection with the trial of the cause and not in accordance with the dignity of the court.

This inanimate record cannot by any stretch of the imagination reflect the sneering remarks directed to plaintiff's counsel nor the knowing look and smile directed to the jury pursuant to his remarks. A cursory examination of the record discloses that the trial court was so unsympathetic with the plaintiff's cause that he refused to listen to authorities cited him and his attitude and demeanor thoroughly embarrassed plaintiff's counsel and influenced the jury to such an extent that had the court allowed the jury to pass upon the issues, they would probably by reason of the court's demeanor and attitude have resolved and

returned a verdict in favor of the defendants. In the name of justice this court, in the event it reverses the trial court's order, should instruct him to refrain from the procedure adopted by the trial court, or preferably invite another trial judge to sit in the trial of this case.

For the foregoing reasons and based upon the foregoing authorities, we therefore respectfully submit that the district court erred in granting the motion for directed verdict and in the other respects hereinabove mentioned, and the judgment of dismissal should be reversed and these actions remanded for a new trial by jury.

Respectfully submitted,

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and
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